IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO. 20 OF 1998

Dr. Damodar Tukaram Gaunkar,
major, residing at Costi-
Calem, Sangum, Goa. .... Appellant.

Versus

Shri Gopinath Rama Gaunkar,
major, married,
residing at Costi-Calem,
Sangume, Goa, since deceased,
by L.Rs.

1. Smt. Renukla Damodar Fadte
Gaunkar, daughter, major,
Indian National.

2. Shri Damodar Hari Fadte Gaunkar,
both residing at Costi-Calem,
Sanguem, Goa. .... Respondents.

Shri M. S. Sonak, Advocate for the Appellant.

Mr. M.B. D'Costa, Senior Advocate with Mr. J. A. Lobo, Advocate for the Respondents.

CORAM: N. A. BRITTO, J.

DATE: 30TH SEPTEMBER, 2005.

J U D G M E N T:

In this defendant's Second Appeal, arising from R.C.S. No.116/1986, two substantial questions of law require consideration, and they are as follows :-

a) Whether, in view of the clear mandate of Order XXIII, Rule 3A and in view of the pronouncement of law in respect thereof by the Hon'ble Supreme Court as well as by this Hon'ble Court, a separate suit impugning the Consent Decree on the ground that the same is not lawful is maintainable ?

(b) Whether the impugned Judgment (in R.C.S. No.116/86) is perverse being not based on the evidence on record ?

To answer the said substantial questions of law, it is necessary to refer briefly to some facts.

2. The parties hereto shall be referred to in the names as they appear in the cause title of the said Civil Suit.

3. The dispute between the plaintiff and the defendant who are related to one another in R.C.S. No.62/78 was regarding a structure/taverna situated in Survey No.15/2 of Costi village. As per the defendant, the said structure was utilized as a store-room but later on the same was let out to Govind Rama Gaonkar, the brother of the plaintiff to run a taverna on payment of monthly rent of Rs.10/- which was paid for about two months and thereafter remained unpaid till about 21.9.77 when the said Govind R. Gaonkar expired and that after the death of Govind, the plaintiff entered

the said structure without their permission and the defendant thereafter served a legal notice dated 19.11.77 directing him to vacate the same and thereafter filed R.C.S. No.62/78 for eviction of the plaintiff. The case of the plaintiff in R.C.S. No.62/78 was that the said structure was constructed by him and his late brother Govind Rama Gaonkar with the permission of Smt. Sanguemkar who owned the said property prior to its sale to the father of the defendant and that it was constructed about 30 years back and as such they had acquired right to the land whereon the said structure stood by virtue of continuous possession. The evidence of the defendant as plaintiff in R.C.S. No.62/78 was recorded on 7.12.1981 and thereafter on 1.7.1986 both the parties filed terms of compromise and the learned Civil Judge S.D. at Quepem decreed the suit in terms of the compromise filed by both the parties. One of the terms of the said settlement was that the plaintiff would continue to conduct business of Taverna in the said structure until the time he was unable to conduct it personally.

4. The plaintiff then filed R.C.S. No.116/86 on 1/8/86 seeking a declaration that the decree dated 1.7.86 passed in R.C.S. No.62/78 be declared void. This suit was contested by the defendant and by judgment/decree dated 29.11.88 the learned Civil Judge J.D. at Sanguem was pleased to dismiss the same. However, the learned Addl. District Judge, Margao by his Judgment/Order dated 13.4.98 was pleased to

reverse the said Judgment/decree and declare the said judgment and decree as void. The learned Addl. District Judge directed the suit to proceed.

5. As regards question (a) Shri Sonak the learned counsel on behalf of the defendant has submitted that no separate suit was maintainable for setting aside the said compromise arrived at between the parties on the ground of alleged fraud in view of the bar of Rule 3A, O.23, C.P.C. and if at all the plaintiff wanted the said Judgment/decree set aside, the plaintiff ought to have made an application in that very suit. R.3A of O.23 C.P.C. which reads as follows :-

> " 3-A. Bar to suit. - No suit shall lie to set aside a decree on the ground that the compromise on which the decree is based was not lawful. "

6. Shri Sonak has placed reliance on the case of ***Anant Mahadeo Godbole v. Achut Ganesh Godbole and others (A.I.R. 1981 Bombay, 357)*** and ***Banwari Lal v. Chando Devi (Smt) (through LRS) and another [(1993) 1 S.C.C. 581]*** while Shri B. D'Costa, the learned Senior Counsel on behalf of the plaintiff, has placed reliance on the case of ***Jethalal C. Thakkar and others v. Lalbhai Hiralal Shah (1985 Mh.L.J. 299)***.

7. The answer to question (a) is no longer res integra and is now settled

with the authoritative pronouncement of the Supreme Court in the case of Banwari Lal (supra) and therefore there is no necessity of referring to the Judgment of this Court in the case of Jethalal C. Thakkar (supra).

8. Order 23 C.P.C. deals with withdrawal and adjustment of suits and Rule 3 thereof provides that where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise (in writing and signed by the parties), or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit, the Court shall order such agreement, compromise or satisfaction to be recorded, and shall pass a decree in accordance therewith [so far it relates to the parties to the suit, whether or not the subject-matter of the agreement, compromise or satisfaction is the same as the subject-matter of the suit]:

[Provided that where it is alleged by one party and denied by the other that an adjustment or satisfaction has been arrived at, the Court shall decide the question; but no adjournment shall be granted for the purpose of deciding the question, unless the Court, for reasons to be recorded, thinks fit to grant such adjournment. The explanation below the proviso states that an agreement or compromise which is void or voidable under the Indian Contract Act 1872, shall not be deemed to be lawful within the meaning of this rule.]

9. As already seen Rule 3A creates a bar for the filing of a suit by providing that no suit shall lie to set aside a decree on the ground that the compromise on which the decree is based was not lawful. Needless to observe the provisions of R.3A are quite explicit to the effect that a separate suit will not be maintainable in case a compromise decree is challenged as being not lawful. This Court in the case of ***Anant Mahadeo Godbole v. Achut Ganesh Godbole and others (A.I.R. 1981 Bombay 357)*** stated that the very object of introducing Rule 3A in Order 23 C.P.C. was to bar the filing of a second suit on the ground that the compromise was not lawful. The Court held that the words "not lawful" are wide enough and would take in the cases where parties set up want of authority or exceeding of authority in the matters of agreements or compromises on the basis of which the decrees are made and all types of challenges cannot now, because of bar to suit under Rule 3A, be the subject-matter of a second suit. The Court held that the explanation which is added to Rule 3 provides that an agreement or a compromise which is void or voidable under the Indian Contract Act 1872 shall not be deemed to be lawful within the meaning of that rule. In other words, agreement or compromise should be free from challenges on the ground that they are void or voidable under the provisions of the Indian Contract Act. The explanation so enacted has a purpose to make it clear that it is only lawful agreements or compromises that can be the basis of passing the decrees. The Explanation adds a

clarification again because of the earlier conflict as to whether voidable agreements within the meaning of S.19A of the Indian Contract Act were or were not excluded from the operation of R.3 itself. The Explanation and the amendments introduced in Rule 3 are self-contained and will have to be restricted to the recording of the compromise and making orders therefor. And these cannot further be read in the body of Rule 3A so as to restrict the meaning of the words "not lawful". Now the Supreme Court in the case of Banwari Lal (supra) has observed that the experience of the Courts had been on many occasions parties having filed petitions of compromise on basis of which decrees are prepared, later for one reason or other challenge the validity of such compromise. For setting aside such decrees suits used to be filed which dragged on for years including appeals to different courts. Keeping in view the predicament of the courts and the public, several amendments have been introduced in Order 23 of the Code which contain provisions relating to withdrawal and adjustment of suit by Civil Procedure Code (Amendment) Act, 1976. Further the Supreme Court has stated that R.1 of Order 23 of the Code prescribes that at any time after institution of the suit, the plaintiff may abandon his suit or abandon a part of his claim. Rule 1(3) provides that where the Court is satisfied (a) that a suit must fail by reason of some formal defect, or (b) that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim, it may, on such terms as it thinks fit, grant the plaintiff

permission to withdraw such suit with liberty to institute a fresh suit. In view of Rule 1(4) if plaintiff abandons his suit or withdraws such suit without permission referred to above, he shall be precluded from instituting any such suit in respect of such subject-matter. Rule 3 of Order 23 which contained the procedure regarding compromise of the suit was also amended to curtail vexatious and tiring litigation while challenging a compromise decree. Not only in Rule 3 some special requirements were introduced before a compromise is recorded by the court including that the lawful agreement or a compromise must be in writing and signed by the parties, a proviso with an explanation was also added. By adding the proviso along with an explanation the purpose and the object of the amending Act appears to be to compel the party challenging the compromise to question the same before the court which had recorded the compromise in question. That court was enjoined to decide the controversy whether the parties have arrived at an adjustment in a lawful manner. The explanation made it clear that an agreement or a compromise which is void or voidable under the Indian Contract Act shall not be deemed to be lawful within the meaning of the said rule. Having introduced the proviso along with the explanation in Rule 3 in order to avoid multiplicity of suit and prolonged litigation, a specific bar was prescribed by Rule 3-A in respect of institution of a separate suit for setting aside a decree on basis of a compromise. Referring to Section 96(3) of the

Code, the Supreme Court observed that although the said section says no appeal shall lie from a decree passed by the Court with the consent of the parties, Rule 1-A(2) was introduced saying that against a decree passed in a suit after recording a compromise it shall be open to the appellant to contest the decree on the ground that the compromise should not have been recorded. The Supreme Court observed that when Section 96(3) bars an appeal against decree passed with the consent of parties, it implies that such decree is valid and binding on the parties unless set aside by the procedure prescribed or available to the parties. One such remedy available was by filing the appeal under Order 43, Rule 1(m). But after the amendments which have been introduced, neither an appeal against the order recording the compromise nor remedy by way of filing a suit is available in cases covered by Rule 3-A of Order 23. As such a right has been given under Rule 1-A(2) of Order 43 to a party, who challenges the recording of the compromise, to question the validity thereof while preferring an appeal against the decree. Section 96(3) is applicable to cases where the factum of compromise or agreement is not in dispute.

10. In the light of R.3-A of Order 23 and the authoritative pronouncement of the Supreme Court in the case of Banwari Lal (supra), the question (a) has got to be answered in favour of the defendant. In view of that a separate suit filed by the plaintiff to challenge the consent decree

deserved to be dismissed, as not maintainable.

11.As regards question (b) all that the plaintiff had averred in R.C.S. No.116/86 was that the defendant had again come on 1.7.86 and told the plaintiff that he agreed to the proposal and that he will withdraw the suit so as to maintain good relations and took the plaintiff to the office of his Advocate Bernard D'Souza where the said Advocate asked him whether the matter was settled and to this the plaintiff told that he was ready to settle. It was the case of the plaintiff that he believed that the settlement would be recorded as proposed by him. The plaintiff further pleaded that Advocate Bernard D'Souza obtained signature of the plaintiff on a paper without explaining the contents thereon which he signed believing that what was recorded therein was as per the terms set out by the plaintiff. The plaintiff pleaded that the decree was obtained by fraud and misrepresentation and therefore was liable to be set aside as voidable. Though Order 6, R.4, C.P.C. required particulars to be given whenever fraud is pleaded, the plaintiff gave no particulars at all in the pleadings so as to spell out as to what was agreed between the plaintiff and the defendant which was not incorporated in the consent terms or as to what was incorporated which was not agreed to by the plaintiff and the defendant. The plaintiff made only vague and sweeping allegations in the plaint although it was incumbent upon the

plaintiff in terms of Order 6, Rule 4 to substantiate the contentions regarding the fraud which was allegedly committed by the defendant. Section 17 of the Indian Contract Act, 1872 defines fraud as an act committed by a party to a contract with intent to deceive another. As per Black's Law Dictionary, fraud is defined as an intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or to surrender a legal right; a false representation of a matter of fact, whether by words or by conduct, by false or misleading allegations, or by concealment of that which should have been disclosed, which deceives and is intended to deceive another so that he shall act upon it to his legal injury. A fraud is an act of deliberate deception with design of securing something by taking unfair advantage of another. It is a deception in order to gain by another's loss or in other words cheating intended to get advantage (See ***S.P. Chengalvaraya Naidu v. Jagannath [(1994) 1 S.C.C. 1]***.

12. For the first time the plaintiff stated in his evidence that what was not incorporated in the said consent terms was the agreement or acknowledgment that the suit house/structure was constructed by his late elder brother and himself and that it belonged to him. In fact, the Plaintiff ought not to have been allowed to lead such evidence in the absence of such plea or particulars not being taken or given in the plaint.

The plaintiff did not explain even if the said clause was not incorporated in the said consent terms as to how the other consent terms would be affected or were vitiated by fraud. Admittedly the plaintiff had no male issue and his only daughter was already settled and in the light of that it was agreed between the plaintiff and the defendant that the plaintiff would conduct the business of taverna on his own until he was able to conduct the same personally. This stipulation could stand independently even if the term which according to the plaintiff was agreed upon was not incorporated in the consent terms. The terms agreed upon could also not be said to be unfair to the plaintiff. Even in case it was agreed between the plaintiff and the defendant that the suit house was constructed by the plaintiff's late brother and himself then the condition that the plaintiff would run it till such time he was able to conduct the business himself could not be tainted by any fraud as such. The consent terms were explained to the plaintiff by Advocate Shri D'Souza and not only that the presiding Officer had asked the plaintiff whether he was aware of the contents of the said terms and he had answered in the affirmative. Although the the plaintiff did not take his Advocate Shri Kudchadkar to the office of Advocate D'Souza at the time of drafting the consent terms because the plaintiff wanted to avoid payment of fees to his Advocate Kudchadkar the fact remains that before filing the said consent terms before the Court the plaintiff had met Advocate

Kudchadkar on the ground floor and told him that they were going to settle the matter and Advocate Kudchadkar in turn had told him that they could settle the matter. It is also to be noted that earlier the plaintiff and the defendant had met on five to six occasions regarding settlement, as admitted by the plaintiff himself. The plaintiff earlier had filed an application to be registered as a mundcar in respect of the suit house which was dismissed and not only that, the plaintiff had another advocate who was dealing with another case of the plaintiff before the Revenue authorities. The plaintiff has not been able to provide any explanation as to why he did not show the terms of compromise before filing the same in Court to his Advocate Kudchadkar and chose to show the same to him only after the terms were filed and accepted by the Court. The learned Civil Judge had observed, and in my view, rightly that all the witnesses examined by the plaintiff did not support his case. The learned Civil Judge accepted the statement of DW.2 Advocate D'Souza to the effect that the terms of settlement were fully explained to the party in Konkani and they were drafted as agreed by them. The learned Civil Judge also took note of the admission made by the plaintiff that the Presiding Officer had asked him whether he was aware of the contents of the consent terms and he had replied in the affirmative and therefore the allegation of the plaintiff that the consent decree was obtained by fraud did not bear any substance. The learned Civil Judge

referred to S.114 of the Evidence Act, and in my view rightly, and drew the presumption that judicial acts were regularly performed and therefore it could not be accepted that the consent terms were not explained to the plaintiff by the Presiding officer. However, the learned Addl. District Judge without even coming close to the evidence of the plaintiff on whom there was a heavy burden to prove that the said consent terms were vitiated by fraud proceeded to analyse the evidence of the defendant alone and reversed the judgment of the learned Civil Judge. At the cost of repetition it may be stated that the plaintiff did not at all challenge the other consent terms agreed to by the plaintiff and the defendant and which were filed before the Civil Judge and which would make no change even in case the term which the plaintiff says was not incorporated was incorporated in the said consent terms. The fact that a copy of the consent terms was not given to the plaintiff by the defendant so as to enable him to ascertain its contents would not go to prove that the terms agreed upon were as a result of a fraud practiced by the defendant considering that the terms were explained to the Plaintiff, the plaintiff had the benefit of meeting his own advocate before filing the terms in the Court and then stating before the Civil Judge that the terms filed were as agreed upon. When the presiding officer records any compromise, this has to be treated as a judicial record made by him in the discharge of his judicial duties. As noted by this Court in the case of

Keshav s/o Dattaram v. Yamunabai w/o Nagoba (1986 (1) Bom C.R. 81) if such orders which are read and recorded by the Court are subject to challenge merely on the allegation, the sanctity of the 'records' would be shaken. Considering the evidence led by both the parties, the learned Civil Judge was justified in dismissing the suit filed by the plaintiff and the learned Addl. District Judge without even adverting to the evidence of the plaintiff on whom there was heavy burden to prove that the consent terms were the outcome of a fraud practiced by the defendant was wholly unjustified in reversing the decision of the learned Civil Judge Question (b) therefore deserves to be answered in the affirmative and in favour of the defendant.

12. In the light of the above, the Second Appeal deserves to succeed. The Judgment/Order dated 13.4.1998 is hereby set aside and that of the learned Civil Judge dated 29.11.1988 is restored with no order as to costs.

N. A. BRITTO, J.

sl.